Filed 6/28/12 In re D.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.M., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.W. et al., Defendants and Appellants.	E055210 (Super.Ct.No. J234591) OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A. Buchholz, Judge. Reversed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant C.W.

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant and Appellant C.M.

Jean-Rene Basle, County Counsel, and Jeffrey L. Bryson, Deputy County Counsel, for Plaintiff and Respondent.

Appellants C.W. (mother) and C.M. (father) are the parents of D.M. (the child). Their parental rights as to the child were terminated. Father and mother filed separate briefs on appeal, but join in each other's arguments. Mother claims that the beneficial parental relationship exception (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i)[1]) applied, and that there was no basis for jurisdiction under section 300, subdivision (g). Father contends that the order terminating parental rights should be reversed because the San Bernardino County Children and Family Services (CFS) failed to comply with the requirements under the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) CFS concedes, and we agree, with the ICWA claim. Therefore, we will conditionally vacate the order and remand the matter to the juvenile court with directions to order compliance with the ICWA notice provisions. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 30, 2010, CFS filed a section 300 petition on behalf of the child. The petition alleged that the child came within section 300, subdivisions (b) (failure to protect), and (g) (no provision for support). Specifically, the petition alleged that the child was at risk of suffering harm because of mother's and father's histories of substance

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[1] All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

abuse. It also alleged that father engaged in illegal drug activity while the child was in his presence, and mother failed to protect the child when she knew or reasonably should have known that he was engaging in illegal drug activity in the child's presence. The petition further alleged that father was arrested on drug-related and child endangerment charges, and the child was left with no provision for support. The child was two years old at the time.

In the detention report, the social worker reported that this matter came to CFS's attention after the police reported they had arrested father during a drug sting operation. Father arrived with methamphetamine for sale and had the child on the back of his bicycle, in a seat with no helmet or protective gear. Mother later arrived at the police station and requested custody of the child. A review of mother's past criminal history and dependency history revealed her prior involvement with drugs and her failure to reunify with her two other children. In view of these circumstances, the police determined that it would be in the child's best interest to remove her from mother's custody since mother knew or reasonably should have known that father was engaging in criminal activity, and she allowed him to take the child with him to make a drug transaction. Mother insisted she did not know that father was engaging in illegal drug activities.

At the detention hearing, mother denied Indian heritage. Father reported that he may have Indian ancestry in the "Blackfoot" tribe on his mother's side.[2] He gave his mother's married name, Ethel M., and also spelled her maiden name and specified her age. He had not had contact with her in the last year, so he had no further information. Father also reported that his grandmother, Mabel D., would have knowledge of his Indian ancestry, and he gave her name, telephone number, city of residence, and approximate age. Father indicated he had another grandmother, Cathy L., who may have knowledge of his Indian ancestry, but he had no personal information or contact information for her. The juvenile court ordered the parents to complete the Parental Notification of Indian Status forms. Father indicated on the form he may have Blackfeet ancestry. The court detained the child in foster care.

Jurisdiction/disposition

The social worker filed a jurisdiction/disposition report recommending that the petition be sustained, and the allegation under section 300, subdivision (g), be dismissed. She further recommended that the child be declared a dependent, that father be found to be the presumed father, and reunification services be provided to mother and father (the parents).

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[2] Father refers to the Blackfoot tribe, which is not a federally recognized tribe. However, the Blackfeet tribe is. (68 Fed.Reg. 68180 (Dec. 5, 2003) [listing the "Blackfeet Tribe of the Blackfeet Indian Reservation of Montana"].) Thus, we will treat the claim as raising possible Blackfeet heritage.

The social worker was aware of three visits that had taken place with the parents since the child's removal. She observed at one visit that mother was appropriate in her interactions with the child, and she and the child appeared to be bonded.

The social worker further reported that the child was placed with a maternal uncle and aunt on September 15, 2010.

A jurisdiction/disposition hearing was held on September 21, 2010, and the parents both requested mediation. Father's counsel informed the court that father was released from custody one week prior. The court set the matter for mediation and a presettlement conference on October 27, 2010.

Mediation resulted in a partial agreement. Mother submitted on the section 300, subdivision (b) allegation that she had a drug history, which impeded her ability to effectively parent the child. She also submitted on the other section 300, subdivision (b) allegation, as it was rewritten to state that she failed to protect the child and reasonably should have known father was engaging in illegal drug activity in the presence of the child. CFS and mother agreed that she would enter an impatient facility and have the child placed with her there, and that mother would complete substance abuse treatment and a parenting program. The mediator's report stated that father was currently sentenced to five years, but if release from custody within 12 months, CFS agreed to offer reunification services, which father agreed to participate in.

At a presettlement conference on October 27, 2010, father's counsel informed the court that father had signed a new ICWA form stating he had no Indian heritage that he

knew of. Father confirmed he had no Indian heritage. Father's counsel confirmed father's agreement to the mediation. Counsel for the child requested that the matter be set for contest.

At the jurisdiction/disposition hearing on November 30, 2010, the court sustained the petition as amended, found that the child came within section 300, subdivisions (b) and (g), declared her a dependent of the court, and removed her from the parents' custody. The court ordered reunification services for mother, but not father, in accordance with the mediation agreement. The court also found that father was the presumed father, and that the child did not come within the provisions of ICWA. The court ordered weekly supervised visits for mother.

Six-month Status Review

The social worker filed a six-month status report recommending that the court terminate services and set a section 366.26 hearing. Mother had been provided with numerous services, but had been inconsistent in her participation and had failed to show progress. As to visitation, she had been attending regularly.

At a contested six-month hearing on July 22, 2011, mother's counsel, who was specially appearing for father's counsel, informed the court that father was now indicating that he did have Indian heritage. Counsel gave the name of the great grandfather Wayne D., and said she had his address and phone number. Counsel also gave the name of Catherine L., and Francine D., who was the great grandmother.

Counsel for CFS stated that CFS would follow up with the names and numbers of the relatives.

The court found that mother had failed to participate regularly in her case plan, and that return of the child to the parents would be detrimental to the child's safety. The court ordered services terminated and set a section 366.26 hearing.

ICWA Notice

On September 1, 2011, CFS filed ICWA notices that were originally mailed on August 2, 2011, to the Bureau of Indian Affairs (BIA), the Cayuga Nation, the Seneca Nation of New York, the Seneca-Cayuga Tribe of Oklahoma, and the Tonawanda Band of Senecas. According to the nonappearance review minute order of October 31, 2011, the ICWA notices had been sent with the information provided by the parents, and CFS received responses from the Seneca Nation, Cayuga Nation, Seneca-Cayuga Nation, and the Tonawanda Band, indicating that the child did not qualify for membership. CFS recommended that the court find that notice had been given as required, and the BIA and the Secretary of the Interior had failed to respond after 65 days since notice was received.

Section 366.26

The social worker filed a section 366.26 report recommending that parental rights be terminated and the permanent plan of adoption be implemented. The social worker reported that the child was likely to be adopted due to her age and her foster parents' desire and ability to adopt her. They had been her foster parents for over one year, and they thought of her as their own child. They were committed to adopting her.

The social worker reported that mother was having supervised visits twice a month. The supervising foster parent reported that mother had been defensive and aggressive in the past, but was now exhibiting more cooperation and listening to suggestions about how to best interact with the child. The social worker further noted that the child did "not appear to show attachment to her mother during the supervised visits." Although the child appeared to enjoy the attention from mother at visits, she "[did] not look to mother to have her needs met."

The court held a contested section 366.26 hearing on December 1, 2011. The court heard testimony from mother and the foster mother. It then found it likely that the child would be adopted, terminated parental rights, and set adoption as the permanent plan.

ANALYSIS

I. The Beneficial Parental Relationship Exception Did Not Apply

Mother contends that the court erred in not applying the beneficial parental relationship exception under section 366.26, subdivision (c)(1)(B)(i). We disagree.

At a section 366.26 hearing, the court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) If the court finds that a child may not be returned to his or her parents and is likely to be adopted, it must select adoption as the permanent plan, unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the

child under one of the exceptions set forth in section 366.26, subdivision (c)(1). One such exception is the beneficial parental relationship exception set forth in section 366. 26, subdivision (c)(1)(B)(i). (See *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.) This exception applies when the parents "have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The phrase "benefit from continuing the relationship" refers to a parent/child relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H*).) It is the parent's burden to show that the beneficial parental relationship exception applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345.)

In support of mother's position, she asserts that the social worker stated at the outset of the dependency that she (mother) was "highly appropriate in her interaction with the child and it appears that the two [were] very bonded." Mother then asserts that "all of the evidence indicated the bond continued throughout the case." She points to her own testimony at the section 366.26 hearing that the child called her "mommy," and

called her foster parents "uncle" and "aunt." Mother also testified that the child sometimes cried at the end of her visits and did not want to leave. The child sometimes asked why she could not go home with mother. Mother further asserts that she gave the child clothing and shoes, and fed her when she was hungry. Moreover, she and the child "ate and enjoyed playing together." Mother points out that the foster mother's testimony confirmed her testimony and emphasizes that the foster mother stated that the child has had "outbursts . . . that may be attributed to grief and loss due to separation from her mother." Mother claims this evidence "is more than sufficient to show [the child] will be harmed if the relationship is severed."

We disagree. Mother's interactions with the child do not even begin to demonstrate that her relationship with the child promoted her well-being "to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Mother has not proffered any evidence to support a finding that the child had a "substantial, positive emotional attachment [with her] such that the child would be greatly harmed" if the relationship was severed. (*Ibid.*) While the foster mother did note that the child had outbursts, the outbursts were "occasional." Moreover, the foster mother was only speculating that the outbursts "may" be attributable to grief and loss due to separation from mother. At the same time, the foster mother reported that the child "[did] not appear to show attachment to her mother during the supervised visits." She also observed that, although the child appeared to enjoy the attention from mother, she "[did] not look

to mother to have her needs met." At best, mother's supervised interactions with the child "amounted to little more than playdates for [her] with a loving adult." (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1316.)

In contrast, the evidence shows that the prospective adoptive parents and the child had a mutual attachment, and they were able to meet her social, medical, and financial needs. The prospective adoptive parents felt like the child was their own, and they were committed to adopting and raising her to adulthood.

Mother points out that the prospective adoptive parents only committed to adopting the child a few days before the section 366.26 hearing. However, the prospective adoptive father explained that, up until a few days prior to the hearing, he was not fully committed to adopting the child because he felt that the pressure of dealing with his sister (mother) and other family members would be too difficult. However, he changed his mind after much thought and discussion with his wife and stated that he could not envision the child leaving their home.

We conclude that the beneficial parental relationship exception under section 366.26, subdivision (c)(1)(B)(i), did not apply here.

II. The Court Properly Took Jurisdiction of the Child

Mother argues that the court erred when it found the allegation under section 300, subdivision (g), to be true. She concedes that "this issue is not determinative of the case because jurisdiction was properly taken under section 300, subdivision (b)."

Nonetheless, she argues that the record should be corrected to eliminate jurisdiction under section 300, subdivision (g).

Any challenge to the jurisdictional findings is waived or forfeited by failing to appeal from the dispositional order. (See *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150-1152; *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1754.) Here, the court sustained the petition after mother submitted on the subdivision (b) allegations pertaining to her. Neither mother nor father appealed from the dispositional order, and the time for doing so has long since expired.[3] Since mother did not appeal the jurisdictional findings or the order in a timely manner, her claim is waived.

We note mother's argument that, even though this issue was not asserted earlier, it "is now viable." She relies upon *In re S.D.* (2002) 99 Cal.App.4th 1068 (*S.D.*), in which the mother's counsel's failure to raise an issue regarding the court's jurisdiction finding constituted ineffective assistance of counsel, and the judgment was reversed. (*Id*. at p. 1071.) *S.D.* is distinguishable in many ways. Significantly, the allegation in question (under section 300, subdivision (g)) was the *only* basis for jurisdiction over the child. (*Id.* at p. 1083.) Thus, the dependency could only be sustained if that count was properly pleaded and proven, and the court found that it was not. (*Ibid*.)

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[3] As previously noted, father filed a notice of intent to file a writ petition, but it was dismissed.

Here, as mother concedes, there was a stipulated alternative basis for jurisdiction under section 300, subdivision (b). "When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence. [Citations.]" (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) In other words, "'the juvenile court's jurisdiction may rest on a single ground.' [Citation.]" (*In re Christopher C.* (2010) 182 Cal.App.4th 73, 83.) Because the court here properly took jurisdiction of the child under section 300, subdivision (b), mother's argument regarding subdivision (g), is meaningless.[4]

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[4] We note father's claim that "if termination of the mother's parental rights is reversed on appeal, so must any order terminating [his] parental rights." He relies on California Rules of Court, rule 5.725(a)(2) (rule 5.725, formerly rule 1463) to support his claim. Mother has not raised any issues that compel the reversal of the order terminating her parental rights. Therefore, we will not address father's claim, except to say that rule 5.725 "merely requires that termination of both parents' rights occur in a single proceeding. [Citation.] . . . Nothing in the rule gives appellant the right to urge on appeal that an error in terminating the [mother's] rights redounds to [his] benefit so as to make into error an errorless termination of [*his*] parental rights." (*In re Caitlin B.* (2000) 78 Cal.App.4th 1190, 1194.)

III. The Record Fails to Show That the ICWA Notice Requirements Were Met

Father argues that proper ICWA notice was not given to the tribes.[5] CFS correctly concedes.

A. *Notice Requirements Under ICWA*

"In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912, subd. (a); see also *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1264-1265.) "One of the primary purposes of giving notice to the tribe is to enable it to determine whether the minor is an Indian child. [Citation] Notice is meaningless if no information or insufficient information is presented to the tribe. [Citation] The notice must include . . . information about the Indian child's biological mother, biological father, maternal and paternal grandparents and great-grandparents or Indian custodians, including maiden, married and former names or aliases, birthdates, places of birth and death, current and

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[5] Although father at one point stated he had no Indian heritage, he did indicate, before and after making that statement, that he may have Indian ancestry. "The Indian status of the child need not be certain to invoke the notice requirement. [Citation.]" (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.)

former addresses, tribal enrollment numbers, and/or other identifying information. [Citations.]" (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1115-1116 (*In re S.M.*).)

When the notice sent is inadequate, the orders of the court terminating parental rights should be vacated and the matter should be remanded to the juvenile court with directions to order compliance with the ICWA notice provisions. (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111.) "If, after proper inquiry and notice, no response is received from a tribe indicating the [children are] Indian child[ren], all previous findings and orders shall be reinstated. If a tribe determines that the minor is an Indian child, or if other information is presented to the juvenile court that suggests the [children are] Indian child[ren] as defined by [ICWA], the juvenile court is ordered to conduct a new section 366.26 hearing in conformity with all provisions of [ICWA]." (*Id*. at pp. 111-112; see also *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 261.)

B. *The ICWA Notices Sent to the Tribes Were Deficient*

At the detention hearing, father reported that he may have Indian ancestry in the Blackfeet tribe on his mother's side. He gave his mother's name, Ethel M.; he also gave and spelled her maiden name and her age. He further reported that his grandmother, Mabel D., would have knowledge of his Indian ancestry, and he gave her name, telephone number, city of residence, and approximate age. Father further indicated he had another grandmother, Cathy L., who may have knowledge of his Indian ancestry. However, for reasons that are not apparent, the ICWA notice sent identified father's mother (the paternal grandmother) as Catherine D.-L. Moreover, while the first part of

the hyphenated last name is the same as father's mother's maiden name, it was spelled differently from the spelling father gave in court. The ICWA notice also identified father's grandmother as Mabel Francine D., but spelled the last name differently than it was pronounced at the hearing. The ICWA notice did not list Cathy L. as a grandmother.

Mother's counsel, who specially appeared for father's counsel at the six-month hearing, informed the court that father once again indicated he had Indian heritage, and she gave the name of the great grandfather Wayne D., and said she had his address and phone number. Counsel also gave the name of Catherine L., and Francine D., who was the great grandmother. The ICWA notice that was sent listed David Wayne D. as the paternal great-grandfather, instead of Wayne D., and the last name was spelled differently than it was pronounced at the hearing.

We further note that no notice was sent to the Blackfeet tribe, although father initially claimed he may have ancestry with the Blackfeet tribe. Notice was sent to four Seneca tribes, even though father never indicated he was affiliated with the Seneca tribes. CFS asserts that it contacted father's grandmother, Mabel F.D., and she provided "new and reliable information," including that the "correct tribes" were Seneca tribes. However, CFS neglects to cite any evidence in the record to verify that information. In any event, the notices that were sent to the Seneca tribes contained incorrect and/or incomplete information and misspelled names. CFS should make further inquiry to verify and correct the information it has.

We conclude that CFS failed to comply with ICWA inquiry and notice requirements. Thus, the matter must be remanded for proper ICWA compliance.

DISPOSITION

The orders of the juvenile court terminating parental rights are vacated, and the matter is remanded to the juvenile court with directions to order compliance with the ICWA inquiry and notice provisions. If, after proper inquiry and notice, no response is received from a tribe indicating the child is an Indian child, all previous findings and orders shall be reinstated. If a tribe determines that the child is an Indian child, the juvenile court is ordered to conduct a new section 366.26 hearing in conformity with all provisions of ICWA.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

KING
J.